**Criminal Mediation Committee Minutes**

**Meeting August 27, 2010**

Present: Senior Judge Barry Wood, Chair; Senior Justice Linda Copple Trout; Judge Jeff Brudie; Tony Geddes, Roger Bourne, Pam Madarieta, Professor Maureen Laflin, and Cathy Derden. Absent: Senior Judge Ron Schilling.

Background: As part of the case flow management initiative, Patti Tobias asked Judge Wood to look at the issue of criminal mediation, mainly with the idea of using it in serious felony cases that are so costly in terms of resources. Back in 1992 discussion began about criminal mediation and in 2002 the Supreme Court considered a proposed rule, but no action was taken on it since criminal mediation was already taking place without a rule and there was some opposition to the proposed rule. Criminal mediation is still taking place without a rule but concerns about mediator privilege have again prompted discussion about the necessity for a rule that provides some structure and guidance for the mediator and the parties. Senior Judge Wood started looking at the evidence rule on mediation and privilege and Senior Justice Trout drafted a proposed rule. This Committee was then formed.

Senior Justice Trout, Senior Judge Wood, Judge Brudie and Professor Laflin have all mediated criminal cases and each spoke about the process. The prosecutor is in a separate room from the defendant and defense counsel and the mediator goes back and forth. Some mediators instruct the defendant not to make statements to the mediator and some do not. The mediator leaves when the defendant and his or her counsel need to confer. There were different approaches to mediation but it is not an "evaluation" of the case by the mediator in terms of what the plea offer or resolution should be. While the goal is to resolve the case, it is a way of getting each side to identify problems and issues so that the parties can work toward a resolution. If a rule is adopted, a set of guidelines would also be proposed to address matters such as where and how the mediation is conducted, security, etc.

The Committee began by addressing certain questions about criminal mediation.

Should it be voluntary? All Committee members agreed that participation by the parties must be voluntary. Mediation must be undertaken in good faith and if one of the parties is against it then it will not work.

Who may initiate mediation? Criminal mediation is being used widely in some districts. In the Fifth District it is usually the prosecutor and public defender asking for mediation. There are times the prosecutor and defense attorney agree on a reasonable resolution that counsel for the defendant believes is best but the defendant just won't accept it. For defense attorneys the mediation process and a neutral party can lend credibility to what they are advising defendants.

It can also be helpful in cases where emotions are high. A judge should also be allowed to initiate the idea, though the court should not be able to direct or require mediation. All parties must agree to participate

What types of cases may be mediated? The Committee recognized that not all cases are suitable for mediation but while the original idea was serious felonies, it has also been used in certain misdemeanor cases; for example, where neighbors are involved, so the process should be available in any felony or misdemeanor case. It should also be available in juvenile cases. If a criminal rule on mediation is adopted then a similar juvenile rule should be adopted. The Committee discussed the timing of a request for mediation and agreed that, unless otherwise ordered by the court, mediation should not stay any other proceedings.

What qualifications should the mediator have? The original idea was senior judges but sitting judges are already doing mediation and the Committee wanted to allow judges who have the time and inclination to mediate to do so. If a judge is the mediator then there is no cost to the parties. Having judges who agree to mediate listed on a roster also gives some sanction and structure to the process. Judges who wish to be on the roster should be required to take some training. The Committee reviewed rules from other states on criminal mediation. Kentucky requires twenty-four hours of training. Professor Laughlin noted that the basic mediator training is usually forty hours. There was much discussion that if too many hours of training were required then fewer judges might be willing to participate. Eight hours of training was discussed and it was noted that this training could be provided as part of Judicial Education at the Judicial Conference and Professor Laughlin volunteered to conduct a training session for judges. While all agreed some training was necessary, there was no consensus on the number of hours required and the Committee will revisit this issue.

The use of attorneys as mediators was also discussed but to avoid the cost the Committee agreed that at this time the roster should be limited to judges. There is nothing to prevent the parties from hiring a mediator on their own that is not on the roster should they all agree and choose to do so.

The parties will have to agree on a mediator since participation is voluntary. Similar to the civil mediator roster the roster of judges should give some biographical background so the parties can see a judge's experience in the criminal area as either a prosecutor or defense counsel prior to becoming a judge. The parties can choose a mediator from the roster or the judge can choose one, taking into consideration the recommendations of the parties.

What is the role of victims? Victims are not involved in plea negotiations. Prosecutors do advise how they plan to resolve the case but it is ultimately the prosecutor's decision. It would not be expected that victims be present during mediation but there may be some prosecutors who want them there. While the victim would have to be notified of the mediation, it was determined that it is within the prosecutor's discretion as to whether the victim should be present.

What are the provisions for confidentiality? All statements made during mediation are confidential and the mediator is to advise the sitting judge only as to whether the mediation was successful and, if so, the agreed upon terms of the mediation. The Committee members liked the wording of the federal rule for the Western District of Washington that provides all proceedings are privileged and not reported and that no statement made by any participant at the mediation shall be admissible at trial of any defendant in the case or be considered for any purpose in the sentencing of any defendant in the case, and that no statement made by a defendant in the course of a mediation shall be reported to the counsel for the government. There should also be a separate evidence rule addressing this issue.

Should the mediating judge be allowed to accept a plea? The role of the mediator is to facilitate a resolution and a question arose as to whether a mediator could ever take a plea. Any agreement reached by the parties during mediation is subject to approval by the court assigned to the case and is not final until that court agrees to the terms. The rule in the Western District of Washington provides that the mediator cannot take a plea, and the Committee noted there is a potential problem the defendant will later argue he or she was coerced. While the Committee agreed in general that it was best practice not to allow the mediator to take a plea, the Committee also agreed an exception should be made if at the end of mediation the defendant wishes to enter a plea but the assigned judge is not available. In some counties the assigned judge may not be available for a few weeks. The exception would only apply if the assigned judge approves the resolution but is not available to take the plea and all parties agree that the mediating judge may do so.

How should the mediator privilege be defined? The Idaho Supreme Court recently adopted I.R.E. 507 to address mediation and the mediator privilege, along with the legislature's adoption of the Uniform Mediation Act. Unlike most privileges, the rule provides that the privilege belongs to the mediator and that the parties cannot waive it on behalf of the mediator or compel a mediator to ever testify. This would mean that in a post-conviction case where the defendant alleges ineffective assistance of counsel in relation to a criminal mediation, defense counsel and the prosecutor could not force the mediator to testify. The mediator could testify but only if the mediator agreed to do so. At the time this rule was drafted it was drafted with civil cases in mind and was not considered in the context of a criminal mediation or a post-conviction proceeding. The Committee members discussed the rule on criminal mediation as providing an exception to the privilege held by the mediator if the defendant complains about the conduct of the prosecutor or defense counsel. A separate subsection would have to be added to I.R.E. 507 addressing this subject.

A draft of the proposed rule will be circulated with the minutes and the Committee will meet again to discuss the number of hours of training judges should be required to take to be on a criminal mediation roster, the curriculum for this training, the scope of the mediator privilege and any proposed amendments to the Evidence Rules. Proposed guidelines will also be considered.